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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

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11 RICHARD BREES,

12 Plaintiff,

13 v.

14 HMS GLOBAL MARITIME INC, et al.,

15 Defendants.

CASE NO. 3:18-cv-05691-RJB

ORDER ON PIERCE COUNTY
DEFENDANTS' CR 12(B) MOTION
TO DISMISS

16 THIS MATTER comes before the Court on Pierce County Defendants' Supplemental
17 Brief and/or Amended CR 12(b) Motion to Dismiss ("Amended Motion to Dismiss"). Dkt. 95.
18 The Court is familiar with the motion, all materials filed in support of and in opposition to the
19 motion, and the remainder of the record herein, and it is fully advised. For the reasons set forth
20 below, the Court should grant Pierce County Defendants' Motion to Dismiss.

21 **I. BACKGROUND**

22 This case arises from allegedly unlawful searches conducted by ferry personnel against
23 Plaintiff Richard Brees when he attempted to board the ferry in his car. Dkt. 83. Pierce County
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1 contracts with Defendant HMS Ferries, Inc. (“HMS”) to operate Pierce County’s ferry system.
2 Dkt. 46, at 2.

3 Plaintiff’s Second Amended Complaint, the operative complaint, alleges two unlawful
4 searches: one occurring on May 17, 2018, and the other on May 18, 2018. Dkt. 83, at 8–10. In
5 the first alleged search, Plaintiff claims that Defendant Steve Caputo, General Manager (“GM”),
6 HMS Ferries, Inc., alongside an unnamed Senior Ticketing Agent and Ferry Captain, attempted
7 to search his vehicle on May 17, 2018. Dkt. 83, at 8–10. Plaintiff apparently resisted the search
8 and was eventually allowed to board the ferry. Dkt. 83, at 9.

9 In the second alleged search, Plaintiff claims that an “angry GM” initiated a retaliatory
10 search of his vehicle. Dkt. 83, at 9–10. Plaintiff alleges that he initially resisted the search, but
11 “under duress” and “[d]esperate to get home, ... [he] walked to his [vehicle] trunk, opened it,
12 and said ‘fine, I’ll play along, I have to get home, my wife is out of town, and our pets need care,
13 so here search away.’” Dkt. 83, at 10–11. Plaintiff alleges that ferry personnel then searched his
14 car’s trunk and instructed Plaintiff to open a large bag, the contents of which were inspected.
15 Dkt. 83, at 11. The operative complaint provides that, after the search was completed, Plaintiff
16 told the GM, “I’ll see you in court asshole.” Dkt. 83, at 11. Plaintiff was then not allowed to
17 board the ferry. Dkt. 83, at 11.

18 On August 22, 2018, Plaintiff, proceeding pro se, filed an initial complaint with claims
19 against HMS Ferries, Inc., HMS Global Maritime, Inc., and Steve Caputo. Dkt. 1-1. On April 19,
20 2019, Plaintiff filed a first Amended Complaint naming additional defendants, including Pierce
21 County and three of its employees, Tiffany Garcia (“Ms. Garcia,” Risk Investigator), Lauren
22 Behm (“Ms. Behm,” Airport and Ferry Administrator), and MaryBeth DiCarlo (“Ms. DiCarlo,”
23 Risk Manager). Dkt. 35-1.

1 Defendants Pierce County, Ms. Garcia, Ms. Behm, and Ms. DiCarlo filed an initial
2 motion to dismiss (Dkt. 51; still pending consideration), which the Court granted in an order that
3 it later vacated. Dkts. 74; 81; and 88. The Court granted leave to Plaintiff to file a second
4 amended complaint. Dkt. 81. The Court also granted leave to the defendants to amend or
5 withdraw their pending motions for dismissal after Plaintiff filed his Second Amended
6 Complaint (Dkt. 83). Dkt. 88.

7 Plaintiff's Second Amended Complaint abandoned any claims against Ms. Behm, but
8 maintained several claims against Defendants Pierce County, Ms. Garcia, and Ms. DiCarlo
9 (collectively "County Defendants"). Dkts. 83; and 88, at 4–5. Plaintiff's Second Amended
10 Complaint makes fourteen claims, nine of which are against County Defendants. Dkt. 83, at 12–
11 15, ¶¶ 4–5 and 8–14. Plaintiff's only federal claim against County Defendants is a 42 U.S.C. §
12 1983 claim alleging violation of the Equal Protection Clause of the Fourteenth Amendment. Dkt.
13 83, at 14, ¶ 11. All other cognizable claims against County Defendants appear to be state law
14 claims. Dkt. 83, at 12–15.

15 County Defendants filed the instant Amended Motion to Dismiss. Dkt. 95. Plaintiff filed
16 an apparent response in opposition to the instant motion. Dkt. 103. County Defendants filed an
17 apparent reply in support of the instant motion. Dkt. 106.

18 **II. DISCUSSION**

19 **A. PRO SE STANDARDS**

20 When a plaintiff proceeds pro se, a district court is required to afford plaintiff the benefit
21 of any doubt in ascertaining what claims plaintiff raised in the complaint and argued to the
22 district court. *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008), (citing *Morrison v. Hall*, 261
23 F.3d 896, 899 n.2 (9th Cir. 2001)); *see also Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d
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621, 623 (9th Cir. 1988) (pleadings of pro se civil rights plaintiff to be construed liberally, affording plaintiff benefit of any doubt).

Because plaintiff filed this complaint pro se, the court has construed the pleadings liberally and has afforded plaintiff the benefit of any doubt. *See Karim-Panahi*, 839 F.2d at 623. However, “[p]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

B. FED. R. CIV. P. 12(b)(6) MOTION TO DISMISS

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.

A complaint must contain “enough facts to state a claim to relief that is plausible on its face” so as to “raise a right to relief above the speculative level. *Id.* at 562-63. “The plausibility standard ... asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the

1 line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662,
2 678 (2009). (internal citations and quotations omitted). “Threadbare recitals of the elements of a
3 cause of action, supported by mere conclusory statements do not suffice.” *Id.*

4 Rule 8(a) of the Federal Rules of Civil Procedure provides that in order for a pleading to
5 state a claim for relief it must contain a short and plain statement of the grounds for the court’s
6 jurisdiction, a short and plain statement of the claim showing that the pleader is entitled to relief,
7 and a demand for the relief sought. The statement of the claim must be sufficient to “give the
8 defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley*
9 *v. Gibson*, 355 U.S. 41, 47 (1957).

10 1. 42 U.S.C. § 1983 Standards

11 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (1) the conduct
12 complained of was committed by a person acting under color of state law, and (2) the conduct
13 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United
14 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*,
15 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both
16 of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985). “To state a
17 claim under 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the Fourteenth
18 Amendment a plaintiff must show that the defendants acted with an intent or purpose to
19 discriminate against the plaintiff based upon membership in a protected class.” *Barren v.*
20 *Harrington*, 152 F.3d 1993, 1194-95 (9th Cir. 1988). “A local government entity cannot be held
21 liable under § 1983 unless the plaintiff alleges ‘that the action inflicting injury flowed from
22 either an explicitly adopted or a tacitly authorized [governmental] policy.’” *Ortez v. Washington*
23 *Cty., State of Or.*, 88 F.3d 804, 811 (9th Cir. 1996) (quoting *Gibson v. United States*, 781 F.2d
24 1334, 1337 (9th Cir.1986)).

1 “Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that
2 each government-official defendant, through the official’s own individual actions, has violated
3 the constitution.” *Iqbal*, 556 U.S. at 676. A plaintiff must allege facts showing how individually
4 named defendants caused, or personally participated in causing, the harm alleged in the
5 complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A person acts under color of
6 state law when he or she “exercises power possessed by virtue of state law and made possible
7 only because the wrongdoer is clothed with the authority of state law.” *Id.* at 49. “The purpose of
8 § 1983 is to deter state actors from using the badge of their authority depriving individuals of
9 their federally guaranteed rights.” *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (citing
10 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)).

11 2. Plaintiff’s 42 U.S.C. § 1983 Claim

12 Plaintiff’s Second Amended Complaint’s 42 U.S.C. § 1983 claim against County
13 Defendants should be dismissed. Plaintiff has not alleged that the County Defendants’ actions
14 flowed from a county policy, custom, or practice. Additionally, despite sometimes stating that he
15 is an “indigent [] senior citizen” and that he is in a “fragile class” e.g., Dkt. 103, at 22, 25,
16 Plaintiff has not shown that he is a member of a protected class, nor has he alleged facts showing
17 that County Defendants discriminated against him for being a member of any protected class.

18 Plaintiff’s factual support is insufficient as to his § 1983 claim against County
19 Defendants and does not satisfy the plausibility standards set forth in *Iqbal*. Plaintiff has
20 provided only unclear, conclusory allegations in support of his § 1983 claim. Plaintiff has not
21 adequately pled his § 1983 claim and his Second Amended Complaint does not satisfy the
22 requirements of Rule 8(a). It is entirely unclear from Plaintiff’s Second Amended Complaint
23 how County Defendants violated Plaintiff’s constitutional rights. *See, e.g.*, Dkt. 83, at 8, 14
24 (providing Plaintiff’s claim that Defendants Ms. Garcia and Ms. Dicarlo “acting under the color

1 of state [sic] did conspired [sic] to deny the Plaintiffs [sic] his right(s) to procedural due process
2 free of the unjust enrichment favoring the defendants” and that “Pierce County failed to meet
3 substantive due process requirements [] by prejudging issues of fact in favor of HMS in a quasi-
4 investigation”).

5 Therefore, the Court should grant County Defendant’s Motion to Dismiss as to Plaintiff’s
6 42 U.S.C. § 1983 claim. County Defendants further argue that Defendants Ms. DiCarlo and Ms.
7 Garcia are qualifiedly immune. Dkt. 95, at 10–12. However, because the Court will dismiss
8 Plaintiff’s § 1983 claim as to the County Defendants for the reasons discussed above, the Court
9 need not consider County Defendants’ qualified immunity arguments.

10 3. Pendent State Law Claims & Supplemental Jurisdiction

11 Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental
12 jurisdiction over state law claims if (1) the claims raise novel or complex issues of state law, (2)
13 the state claims substantially predominate over the claim which the district court has original
14 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,
15 or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
16 “While discretion to decline to exercise supplemental jurisdiction over state law claims is
17 triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of
18 economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999,
19 1001 (9th Cir. 1997) (internal citations omitted); *see also Les Shockley Racing, Inc. v. Nat’l Hot*
20 *Rod Ass’n*, 884 F.2d 504, 509 (9th Cir. 1989) (“A district court’s exercise of pendent jurisdiction
21 over state law claims arising from the same set of operative facts that supports a federal claim is
22 a matter of discretion”). “When ... the court dismisses the federal claim leaving only state claims
23 for resolution, the court should decline jurisdiction over the state claims and dismiss them
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1 without prejudice.” *Les Shockley Racing, Inc.*, 884 F.2d at 509 (citing *Carnegie–Mellon Univ. v.*
2 *Cohill*, 484 U.S. 343 (1988). Although “it is generally within a district court's discretion either to
3 retain jurisdiction to adjudicate the pendent state claims or to remand them to state court,”
4 *Harrell v. 20th Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991), in the interest of fairness, the parties
5 should be given an opportunity to be heard on whether the Court should decline to exercise
6 supplemental jurisdiction over the state law claims.

7 Plaintiff’s 42 U.S.C. § 1983 claim against County Defendants will be dismissed by this
8 order, leaving, as to County Defendants, only Plaintiff’s state law claims. Plaintiff’s state law
9 claims against County Defendants are confusing and it is unclear (and perhaps doubtful) that
10 they are sufficiently related to the same case or controversy underlying Plaintiff’s remaining
11 claims against the other parties to warrant supplemental jurisdiction. Therefore, the parties
12 should be ordered to show cause, in writing, if any they have, why this Court should not decline
13 to exercise supplemental jurisdiction over and dismiss without prejudice Plaintiff’s state law
14 claims against County Defendants. The parties’ showings, if any, should be limited to five pages
15 and filed no later than November 1, 2019. If Plaintiff’s state law claims are dismissed without
16 prejudice, Plaintiff may choose to pursue those claims in state court.

17 **C. PENDING MOTIONS RELATED TO COUNTY DEFENDANTS**

18 There remain five other pending motions related to County Defendants, three of which
19 are Plaintiff’s motions to compel discovery (Dkts. 62, 63, and 85) and one is County Defendants’
20 Motion for Stay and Continuance (Dkt. 90). The Court granted, in part, County Defendants’
21 Motion for Stay and Continuance by staying discovery as to County Defendants until the Court
22 decides the instant motion to dismiss; the remaining portions of County Defendants’ Motion for
23 Stay and Continuance were renoted for consideration on October 18, 2019. Dkt. 97. Discovery as
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1 to County Defendants should remain stayed until the Court has considered the parties' showings,
2 if any, which are due no later than November 1, 2019; additionally, Plaintiff's three motions to
3 compel discovery (Dkts. 62, 63, and 85) and County Defendants' Motion for Stay and
4 Continuance (Dkt. 90) should be renoted for November 1, 2019. *See Chudasama v. Mazda*
5 *Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of
6 a claim or defense, such as a motion to dismiss based on a failure to state a claim for relief
7 should ... be resolved before discovery begins.").

8 The fifth other pending motion is County Defendants' initial motion to dismiss. Dkt. 51.
9 Although there are substantial differences between the initial motion to dismiss and the instant
10 motion, it appears that the instant motion should have replaced County Defendants' initial
11 motion to dismiss. Therefore, the Court should strike County Defendants' initial motion to
12 dismiss (Dkt. 51).

13 III. ORDER

14 Therefore, it is hereby **ORDERED that:**

- 15 • Defendants Pierce County, Tiffany Garcia, and MaryBeth DiCarlo's
16 Supplemental Brief and/or Amended CR 12(b) Motion to Dismiss (Dkt. 95) is
17 **GRANTED** as follows:
 - 18 ○ Plaintiff's 42 U.S.C. § 1983 claim is **DISMISSED** as to Defendants Pierce
19 County, Tiffany Garcia, and MaryBeth DiCarlo.
- 20 • The parties are **ORDERED TO SHOW CAUSE**, in writing, if any they have,
21 why this Court should not decline to exercise supplemental jurisdiction over and
22 dismiss without prejudice Plaintiff's state law claims against Defendants Pierce
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County, Tiffany Garcia, and MaryBeth DiCarlo. The parties' showings, if any, shall be filed by **November 1, 2019**, and shall not exceed five pages.

- Discovery as to Defendants Pierce County, Tiffany Garcia, and MaryBeth DiCarlo only is **STAYED** until the Court decides whether to decline to exercise supplemental jurisdiction over Plaintiff's state law claims against Defendants Pierce County, Tiffany Garcia, and MaryBeth DiCarlo.
- Plaintiff's motions to compel discovery (Dkts. 62, 63, and 85) and County Defendants' Motion for Stay and Continuance (Dkt. 90) are **RENOTED** for consideration to **November 1, 2019**.
- Defendants Pierce County, Tiffany Garcia, and MaryBeth DiCarlo's CR12(b) Motion to Dismiss (Dkt. 51) is **STRICKEN**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 25th day of October, 2019.



ROBERT J. BRYAN
United States District Judge